Constitutional Rights First: The Italian Constitutional Court fine-tunes its “Europarechtsfreundlichkeit”

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Only a few days after the Court of Justice of the European Union buried the hatchet in the so-called *Taricco* saga (reported step by step on Verfassungsblog by Bassini and Pollicino –here, here, here– and by myself here), the Italian Constitutional Court issued its decision no. 269 of 2017 (an English translation of the decision is available here). This decision may inaugurate the most significant shift of its jurisprudence in European affairs since 1984, when the Constitutional Court fully accepted the principle of primacy of EU law and blessed the disapplication of national legislation incompatible with EU law. However, the decision should be approached with some caution, as the most important parts consist of *obiter dicta*.

Since 1984 (when the Italian Constitutional Court issued its *Granital* decision), where a national piece of legislation clashes with a European Union rule endowed with direct effect, the national judge directly applies the European Union provision. Conversely, when a national piece of legislation conflicts with European Union rules lacking direct effect, lower judges are required to raise a question of constitutionality to the Constitutional Court.

Within this framework, it might happen that a national piece of legislation raised doubts of compatibility both with the national Constitution and with European Law (so-called “dual preliminarity”). Until recently, in cases when a lower court has doubts about the constitutionality of a piece of legislation and where, at the same time, the legislation appeared to be in conflict with European law endowed with direct effect, the Constitutional Court had usually required the lower judge to submit the reference for preliminary ruling first. If need be, the Constitutional Court only admitted to submit a question of constitutionality on the same matter after the issue of interpretation of EU law was solved.

In the decision issued at the end of 2017, the Italian Constitutional Court addressed the specific problem of “dual preliminarity” in the field of protection of fundamental rights: in other words, the Constitutional Court considered the case of a national law potentially infringing both the Italian Constitutional and the EU Charter of Fundamental Rights (CFREU). Although only in an *obiter dictum*, the Court fine-tuned its previous jurisprudence, by reversing the procedural order when the protection of fundamental rights is at stake. According to the new Court’s new approach, in case fundamental rights protected both by the national Constitution and by the CFREU are at stake, the lower judge should first knock at the Constitutional Court’s door. Only in case doubts of compatibility with EU law are still on the ground after the Constitutional Court’s decision, lower judges remain free to submit a reference for preliminary ruling to the Court of Justice of the EU. The obiter apparently aims at preventing ordinary courts to enforce fundamental rights without addressing the Constitutional Court. However, it seems in line with the CJEU case law (C-188/10 C-189/10, *Melki and Abdeli*), as the Constitutional Court leaves open for the lower judge the possibility of making under Article 267 TFUE after the question of constitutionality is settled.

In fact, the CJEU stated that Article 267 TFEU only precludes a national legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the nature of that procedure prevents all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. Whereas the CJEU found that Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free to refer to the Court of Justice for a preliminary ruling at the end of the interlocutory procedure for the review of constitutionality any question which they consider necessary, and this is certainly the case in the new approach of the Italian Constitutional Court.

However, the decision of the Italian Constitutional Court bears an ambivalent meaning. On the one hand, its tone and register is fully European-law friendly. The Italian Constitutional Court recognizes the principles of the primacy and direct effect of European Union law “as consolidated in both European and constitutional case law” (para. 5.2) and it further acknowledges the “typical constitutional stamp” (ibid.) of the content of the Charter of Fundamental Rights of the EU. Seemingly, the Court’s fine-tuning of its jurisprudence is due to the European-friendly concern of providing fundamental rights with an *erga omnes* protection, and the related need for a centralized system of constitutional review of laws, when the protection of fundamental rights is at stake. Additionally, the Court expressly refers to the metaphor of judicial dialogue within the framework of the principle of loyal cooperation. On the other hand, the direction the Court is pointing to recalls the *Solange I* decision of the *Bundesverfassungsgericht*: as long as fundamental rights are protected by the national Charter, national Constitutional adjudication should prevail over the European circuit of adjudication (if not hierarchically, procedurally).

The Court specified this new procedural order in form of a needed “clarification” (para 5.1.). In fact, in the case at hand it was not necessary to solve simultaneously pending doubts of compatibility with national constitutional law and EU law. This unnecessary clarification suggests the Italian Constitutional Court’s firm intention to deliver a strong message to the national and European community of interpreters. This message seems in line with the Constitutional Court’s recent attitude to express its voice within the European composite constitutional system. In fact, for several years the Constitutional Court preferred to stay out of any direct dialogue with the CJEU, by denying its legitimacy to submit preliminary references to the CJEU. After decades of splendid isolation, it was only in 2008 that the Italian Constitutional Court inverted this trend, and submitted its first reference for preliminary ruling, later followed by a second reference in 2013. The Court’s intention to express its voice in the European circuit of adjudication remained firm even in its most dramatic developments: last year, the Constitutional Court challenged the primacy of EU with its third and last reference for preliminary ruling in the *Taricco* saga. Nonetheless, the Court once again opted for a dialogic approach, stressing its voice rather than opting for the exit strategy that was invoked by many interpreters and that would have consisted in the open and immediate disobedience to the CJEU.

The decision commented here seems to be in line with the Court’s preference for voice rather than exit, and reaffirms the Court’s pivotal role in the protection of fundamental rights. We are probably witnessing a new phase of the so-called Constitutional Court’s European pathway, although it is not completely clear where this pathway will lead.

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